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NO. 95-1352

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GARY EDWARDS and TANA WOOD,
Petitioners,

vs.

JERRY B. BALISOK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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I. BALISOK'S § 1983 CLAIM SHOULD BE DISMISSED

A. Introduction.

Respondent Jerry Balisok was charged with violating the prison disciplinary code. After a hearing he was found guilty of the violations and lost 30 days of good-time credits. Balisok filed a civil rights action alleging that Petitioners (prison officials) violated his due process rights at the prison disciplinary hearing. There are two independent reasons why Balisok may not proceed with a civil rights action.

First, this case involves the interrelationship between the federal habeas corpus statute 28 U.S.C § 2254(b) and the federal civil rights statute 42 U.S.C. § 1983. In our opening brief we set out a bright-line rule to resolve the interrelationship of these two statutes. The bright-line rule is that exhaustion of state remedies is required whenever a prisoner's allegations, no matter what relief is requested, could also state a claim for relief from unlawful confinement. Pet. Br. 12-26. Under this rule, Balisok must pursue his habeas corpus remedy because his due process allegations state a claim for the restoration of good-time credits. Pet. Br. 27-32.

Second, the tort law analysis in *Heck v. Humphrey*, 512 U.S. ___, 114 S. Ct. 2364 (1994) bars Balisok's § 1983 claim because that claim necessarily implies the invalidity of his loss of good-time credits. Pet. Br. 27-32.

Either of these reasons provide an independent basis to reverse the decision of the United States Court of Appeals for the Ninth Circuit. The opening brief also explained that these two reasons are consistent with *Wolff v. McDonnell*, 418 U.S. 539 (1974). Pet. Br. 32-34.

B. The Interrelationship Between Habeas Corpus and § 1983 Should Be Resolved Through the Application of the Bright-Line Rule.

The interrelationship of § 2254 and § 1983 has been a continuing source of conflict and confusion for the federal courts. Pet. 13-21; Pet. Reply 1-6. We propose a bright-line rule which clarifies the application of these two statutes when they overlap. Pet. Br. 12-26. In their responses, Balisok and the American Civil Liberties Union and other amici (ACLU) argue that adoption of the bright-line rule would constitute judicial rule making, and that this question should be left to Congress. Res. Br. 41-44; ACLU Br. 14-16.

Application of the bright-line rule is not improper judicial rule making. It is the proper role of this Court to construe the operation of two overlapping statutes. *Preiser v. Rodriguez*, 411 U.S. 475, 482-83, 489 (1973). Rather than engraft an exhaustion requirement onto § 1983, the bright-line rule merely defines the appropriate scope and application of an exhaustion requirement that has already been legislatively expressed in § 2254(b).[1]

Under § 2254(b), a prisoner is required to exhaust state habeas corpus remedies before pursuing a "writ of habeas corpus". Congress did not define "writ of habeas corpus". As a result, this Court requires exhaustion of any

[1]This Court also looks to the policies of comity in order to define the scope of the exhaustion requirement of § 2254(b). *Preiser v. Rodriguez*, 411 U.S. 475, 490-92 (1973); *Rose v. Lundy*, 455 U.S. 509, 516-18 (1982). The fundamental importance of comity was illustrated in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 111-116 (1981), where this Court did judicially create a new rule of exhaustion based upon comity principles without any direct statutory basis. Although prison officials do not directly rely on *Fair Assessment*, its analysis illustrates that even without the statutory basis of § 2254(b), comity alone may require the same result.

claim which is properly categorized as an attack on the fact or duration of confinement. *Preiser*, 411 U.S. at 490, 500. Pet. Br. 13-14, 17-19. The bright-line rule properly identifies claims which attack the fact or duration of a prisoner's confinement by focusing on the nature of the claim itself, rather than the relief sought in the prisoner's complaint.[2]

In our opening brief we set out four reasons why this Court should adopt the bright-line rule to reconcile § 2254 and § 1983. Balisok has little response to some of these reasons and the arguments he makes are not well taken.

1. Comity Dictates That State Courts Have the First Opportunity to Review Claims Involving Unlawful Confinement.

In our brief we explained why the bright-line rule was necessary to preserve the fundamental principles of federal-state comity which underlie exhaustion. Pet. Br. 13-17. Balisok does not disagree that comity is a fundamental principle of federal-state relations. Instead, Balisok attempts to minimize the role of comity in this case by arguing that a favorable ruling under § 1983 will not have a *res judicata* effect in a subsequent state habeas corpus action. Res. Br. 26-27. This argument misses the point.

[2]The need to judicially harmonize the respective scope of § 2254 and § 1983 is also made necessary by the fact that application of both statutes has been expanded beyond the narrow scope originally intended by the drafters. *See Heck*, 114 S. Ct. at 2374-75. (Thomas, J., concurring); *Rose*, 455 U.S. at 548 n. 18 (Stevens, J., dissenting). To the extent that overlap results from this judicial expansion, this Court relies on a principled analysis of the general policies that underlie the statutes in order to resolve conflicts.

The fact that a state court may not be bound by a prior federal court ruling under § 1983 does not address the principles of comity that exhaustion is designed to protect. For over a century, this Court has recognized that federal courts should not consider a habeas claim "until after the state courts have had an opportunity to act". *Rose v. Lundy*, 455 U.S. 509, 515, (1982), citing *Ex Parte Royall*, 117 U.S. 241, 251 (1886). Contrary to Balisok's suggestion, comity is not satisfied by giving state courts a second, independent opportunity to address claims. The purposes of exhaustion and federal-state comity are only satisfied by giving state courts "the first opportunity to correct the errors made in the internal administration of their prisons." *Preiser*, 411 U.S. at 492.

Comity and the public good require that federal-state relations "be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." *Rose*, 455 U.S. at 515, quoting *Royall*, 117 U.S. at 251. With or without *res judicata*, the principle of comity is frustrated if a state court is confronted with a federal court judgment that has already resolved the same issues against the same state officials. Where, as here, the prisoner's claim is by its very nature an attack on loss of liberty, Congress intended that state courts be given the first opportunity to consider the claim.[3]

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[3]Balisok also argues that allowing his claims to proceed without exhaustion will not interfere with prison administration because a federal ruling on prison disciplinary procedures will not prevent prison officials from holding hearings and imposing appropriate sanctions. Res. Br. at 40. This also misses the point. Allowing Balisok to proceed without exhaustion will lead to greater federal intrusion in the area of state prison administration and deprive state courts of the first opportunity to correct any errors in the internal administration of a state prison disciplinary system. *Preiser*, 411 U.S. at 492; *Sandin v. Conner*, ___ U.S. ___, 115 S. Ct. 2293, 2299-2300 (1995).

2. The Only Reason Prisoners Have Due Process Rights in a Disciplinary Hearing is to Prevent an Arbitrary Loss of Liberty.

The bright-line rule recognizes the primacy of the liberty interest which lies at the heart of a due process claim. Pet. Br. 17-19. The very purpose of due process at a disciplinary hearing is to prevent an arbitrary loss of good-time credits. Balisok agrees with this point and the ACLU does not debate it. Res. Br. 12-13 and n.9. Without a deprivation of the good-time credits, Balisok would have no procedural rights at all.[4] Pet. Br. 17-19. By its very nature, Balisok's procedural due process claim is an attack on the deprivation of liberty itself. As such it must first be addressed in a habeas corpus action.

3. The Relief Section of a Prisoner's Complaint is an Unreliable Guide For Assessing the Nature of the Prisoner's Claim.

Our brief also explained why application of § 2254(b) should not depend on the relief section of a prisoner's complaint.[5] Pet. Br. 19-23. As examples, we

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[4]Balisok also contends that we have conceded the existence of a state created liberty interest in early release based on good-time credits. Res. Br. 1, n.1, 12, n.8. Balisok is incorrect. For purposes of our motion to dismiss, we assumed Balisok had a liberty interest in good-time credits. However, we do not concede this point. That question is disputed in *Wood v. Gotcher*, Supreme Court No. 95-1385, pending before this Court. Pet. Br. 5, n.2.

[5]Under *Preiser* and *Heck*, a prisoner would never be able to request good-time credits in the relief section of his civil rights complaint. *Heck*, 114 S. Ct. at 2369, citing *Preiser*, 411 U.S. at 488-

noted that Balisok temporarily dropped his request for good-time credits in order to avoid exhaustion, and that Gotcher unintentionally failed to request his good-time credits, thereby frustrating his ability to seek habeas relief. *Id.*

Rather than explain his strategic amendment or address the problems of a relief-based approach, Balisok argues that his original request for good-time credits "cannot be considered by the Court." Res. Br. 31. Although Balisok's original complaint has been superseded, it remains a relevant part of the course of these proceedings. In another part of his brief, Balisok expresses concern that exhaustion may preclude a federal court from reviewing a subsequent § 1983 claim. Res. Br. 26-27.[6] This concern underscores the likelihood that prisoners will attempt to circumvent exhaustion. *See* Pet. Br. 20-21, n.12.

The brief of the ACLU also confirms the need for a bright-line rule when it argues that Gotcher must now be allowed to seek damages for allegedly unlawful confinement because, having been released from prison, he can no longer seek habeas relief. ACLU Br. 19-23. The ACLU's concern with Gotcher's predicament is best addressed through application of the bright-line rule. The

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90; *see also Dog Essence Saladin Amin v. Pruett*, ___ F. Supp. ___, 1996 WL 341522 at 3 (E.D. Va., June 12, 1996) ("even before *Heck*, it was unlikely that prisoners would ordinarily seek restoration of good-time credits in a § 1983 action, because it is clear under *Preiser* that they could not."). The bright-line rule recognizes that if a prisoner has affirmatively alleged all elements necessary to legally support a claim for a shorter duration of confinement, the claim is in "essence" an attack on the duration of confinement. There is no need to look to the subjective motivations of the inmate or to explore the theoretical question of whether success on the claim might not lead to a restoration of the lost good-time credits.

[6]This issue is addressed more fully *infra*, p.10 below.

bright-line rule would have prevented this strategic blunder and given Gotcher an opportunity to seek good-time credits before it was too late to do so. *See* Pet. Br. 22-23, n.14. Under the bright-line rule, a district court would have directed Gotcher to pursue habeas relief because his due process allegations stated a claim for restoration of good-time credits. Under the expedited procedures for habeas review, Gotcher had an opportunity to achieve release from the allegedly unlawful confinement.[7] The bright-line rule will ensure that prisoners like Gotcher will receive a federal forum and remedy before it is too late for the inmate, or the State, to correct the asserted error.

4. The Bright-Line Rule Is Based on Fed. R. Civ. P. 12(b)(6) and Easily Identifies the Nature of the Prisoner's Claim.

Federal Rule of Civil Procedure 12(b)(6) provides an appropriate and easily applied standard for determining whether a prisoner's claim should be categorized as an attack on his or her duration of confinement. Pet. Br. 24-26. Under the bright-line rule, a prisoner should be required to exhaust habeas corpus remedies if the allegations in the § 1983 complaint could support a claim for good-time credits under Fed. R. Civ. P. 12(b)(6), regardless of the relief requested. The standard is appropriate because it focuses on the nature of the claim itself, rather than on the relief specified in a prisoner's pleading. Pet. Br. 17-23.

Balisok and the ACLU argue that the bright-line

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[7]Gotcher's cause of action appears to be barred under *Heck*, because he seeks damages for allegedly unconstitutional imprisonment. *Heck*, 114 S. Ct. at 2372. *Heck*'s bar to such an attack is not rendered inapplicable by the fortuity that Gotcher is no longer incarcerated. *Heck*, 114 S. Ct. at 2374 n.10. *See also* Res. Br. 28.

rule is impossible to apply because the words "could" and "would" have slightly different definitions. *See* Res. Br. 35; ACLU Br. 11 n. 6.[8]

The standard of Fed. R. Civ. P. 12(b)(6) is clear and has been consistently applied by district courts on a daily basis.[9] Under Fed. R. Civ. P. 12(b)(6), the courts "read the facts alleged in the complaint in the light most favorable" to the plaintiff to determine if any "relief could be granted". *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249-50 (1989) (citation omitted). An action should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Because Fed. R. Civ. P. 12(b)(6) is the standard, it makes no difference if the question is framed as whether the complaint "would" state a claim, or "could" state a claim. In applying this standard, federal courts have used "would" and "could" interchangeably. *Compare H.J. Inc.*, 492 U.S. at 249 (whether no relief "could" be granted) with *Haines v. Kerner*, 404 U.S. 519, 521 (1972); *Conley*, 355 U.S. at 45-46 (whether the plaintiff "would" be entitled to relief). The complaint will always state a claim whenever a plaintiff alleges the elements necessary to support a request for restoration of good-time credits.

Because the bright-line rule is premised on the well-defined standard of Fed. R. Civ. P. 12(b)(6), courts will have no difficulty determining whether the plaintiff's allegations, if successfully proven, support a claim for

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[8]In making this semantic challenge to the bright-line rule, Balisok and the ACLU do not cite to Fed. R. Civ. P. 12(b)(6) or address its appropriateness for evaluating the nature of a prisoner's claim.

[9]The Prison Litigation Reform Act now requires district courts to apply this standard before the complaint is even served. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 805(a) (1996).

restoration of lost good-time credits. When restoration of good-time credits is a recognized remedy for the alleged violations, then the nature of the claim is in essence an attack on the plaintiff's duration of confinement. Such a claim should not be allowed to proceed under § 1983 merely because the plaintiff has momentarily omitted the request for relief from unlawful confinement that his own allegations support.[10]

The ACLU argues that the bright-line rule would require district courts to embark on a "speculative voyage" to determine whether a prisoner's allegations could support a claim for restoration of good-time credits "in some future state proceeding". ACLU Br. 11-12. The bright-line rule is based on the easily applied standard of Fed. R. Civ. P. 12(b)(6), which focuses on the allegations set forth in the present complaint, not in some future proceeding. A district court is not required to speculate about the outcome of future proceedings, or the application of state law, *res judicata*, or defenses like harmless error. The bright-line rule is easily applied to any prisoner complaint and asks whether the prisoner's allegations state a claim for relief from unlawful confinement.

In addition to its ease of application, the bright-line rule may also further judicial economy. By refusing to allow prisoners to split a § 1983 claim into two, the bright-line rule eliminates the need to convene two separate juries to address the related claims of damages resulting from the disciplinary procedures, and damages resulting from the disciplinary sanction. The district court will be able to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review.

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[10]The federal courts are already required to look beyond the relief set forth in the complaint. Pet. Br. 24, citing Fed. R. Civ. P. 54(d); *Conley*, 355 U.S. at 45-46. (the question is whether the plaintiff is entitled to any relief under the allegations).

5. The Bright-Line Rule Does Not Impede Federal Review of Constitutional Violations Under § 1983.

Balisok and the ACLU argue that the bright-line rule should be rejected because it may impede federal review of constitutional violations under § 1983. Res. Br. 36-40, 46-48. Balisok suggests that the rule will bar relief for prisoners who run "the risk of being brutally beaten", and who are subject to "dehumanizing treatment", "senseless suffering", or "wretched misery". Res. Br. 46-47 (citations omitted). ACLU Br. 17-18. This argument misconstrues the bright-line rule. The bright-line rule requires prisoners to exhaust habeas corpus remedies if their allegations state a claim for relief from unlawful confinement. By its terms, the bright-line rule does not apply to allegations of prison brutality or inhumane conditions, which do not implicate the fact or duration of confinement.

Balisok also argues that exhaustion will bar federal review of his procedural due process claim because a federal court must accord preclusive effect to issues decided by the state courts during his exhaustion of state habeas remedies. Res. Br. 36-38. Preclusion of a § 1983 claim does not result from exhaustion, but from Congress' enactment of 28 U.S.C. § 1738, which requires the federal courts to give the same full faith and credit to state court judgments as is afforded within the state itself. *Allen v. McCurry*, 449 U.S. 90, 96 (1980).

The possibility that federal review under § 1983 may be limited does not justify any exception to the statutory requirements of state court exhaustion and full faith and credit to state court judgments. Because Balisok's claim is properly classified as an attack on his loss of good-time credits, Balisok must exhaust state remedies, subject to the same statutory provisions as any other litigant.

6. The Bright-line Rule is Consistent With *Heck* Because it Addresses a Question Not Resolved by *Heck*'s Tort Analysis.

Balisok and the ACLU argue that the bright-line rule is foreclosed by *Heck*. Balisok reads *Heck*'s tort law analysis beyond its context. Because the prisoner in *Heck* sought relief premised on unlawful confinement itself, tort law provided an obvious and easy answer -- damages claims must not be used to challenge the validity of an outstanding basis for confinement. *Heck*, 114 S. Ct. at 2371-72. Balisok assumes that under *Heck*, exhaustion is not required for any claim that does not necessarily invalidate the basis of confinement. Res. Br. 11-16; ACLU Br. 6-12.

Balisok is wrong because *Heck* left open the question of whether a prisoner may bypass exhaustion under § 2254(b) by limiting his request for relief to damages that are not premised on unlawful confinement. In *Heck*, this Court specifically refused to address this different question. Much like Balisok, Heck tried to argue that the relief he sought did not include damages premised on unlawful confinement; Heck argued that success on "his damages claims would not invalidate his conviction." *Heck*, 114 S. Ct. at 2368-69 n. 2. This Court refused to address this argument because Heck had not raised it until his reply brief. *Id.* This Court also refused to answer a question raised by Humphrey: whether "exhaustion of state remedies should be required . . . whenever 'judgment in a § 1983 action would resolve a necessary element to a likely challenge to a conviction, even if the § 1983 court [need] not determine that the conviction is invalid.'" *Heck*, 114 S. Ct. at 2373 (citation omitted).

Thus, *Heck* expressly refused to decide the result

for claims that relate to the prisoner's confinement, but do not necessarily invalidate that confinement.[11] The question before the Court in *Heck* was "whether money damages premised on an unlawful conviction could be pursued under § 1983." *Heck*, 114 S. Ct. at 2368-69 n. 2. This Court's holding was confined to claims for "damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid". *Heck*, 114 S. Ct. at 2372. This Court did not abandon the statutory and comity-based analysis that must be relied upon for claims that fall within the intersection of § 2254(b) and § 1983. As discussed above, the bright-line rule provides the appropriate way to address those claims. *Supra*, p. 2-10.

A prisoner who narrows his claim by only requesting relief from procedural violations will not be subject to the tort analysis of *Heck* unless his claim would necessarily invalidate the resulting loss of good-time credits. The bright-line rule provides an appropriate way to assess claims that might invalidate a resulting loss of good-time credits. The bright-line rule is consistent with *Preiser* and *Heck*, and properly focuses on the nature of the plaintiff's claim itself. Regardless of the relief actually sought by a prisoner, the underlying claim is the proper focal point for evaluating the implication of a lawsuit to the prisoner's duration of confinement.

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[11]That issue is presented in this case. Balisok argues that his due process claim will not necessarily invalidate his loss of good-time credits. Res. Br. 11-16. If Balisok is correct, and we contend he is not (*see infra*, p. 13-14), his § 1983 claim should be dismissed under the bright-line rule and Balisok should be directed to pursue his habeas corpus remedy.

C. *Heck* Bars Balisok's § 1983 Claim.

Heck provides a second and independent reason why Balisok cannot proceed with his § 1983 action. In *Heck* this Court applied principles of tort law to bar a prisoner's § 1983 action for damages for unlawful confinement because the § 1983 claim would necessarily imply the invalidity of his conviction. The § 1983 cause of action would not accrue unless the prisoner successfully challenged his conviction in a habeas corpus action.

Balisok agrees that *Heck* applies to cases involving the loss of good-time credits, but argues that the rule in *Heck* does not bar his § 1983 claim. This argument is based on Balisok's contention that his due process claim would not necessarily imply the invalidity of his loss of good-time. Res. Br. 11-16, 21-25. This contention is wrong.

In his complaint, Balisok alleges that prison officials intentionally violated the due process requirements of *Wolff*. Under *Wolff* "the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense". 418 U.S. at 566. Balisok's due process claim is that the prison officials' practice is to deprive jail house lawyers of the ability to present witness statements. Res. Br. 11, Pet. App. I-4 to I-6. This is not a mere procedural technicality, but a clear and serious claim that prison officials violated *Wolff*'s minimum due process protections.

The only reason offered by Balisok that such a serious violation would not invalidate his loss of good-time credits is his interpretation of the "some or any evidence" standard of review in prison disciplinary proceedings. According to Balisok, due process violations will not invalidate the loss of good-time credits if there is some evidence to support the conclusion reached by the prison officials. Res. Br. 21-25. This argument is not well taken

for two reasons.

First, Balisok misinterprets the some evidence rule. This rule only governs the evidentiary requirement of due process. *Superintendent, Mass. Corr. Institution v. Hill*, 472 U.S. 445, 455-56 (1985); *In re Johnston* 109 Wn.2d 493, 497, 745 P.2d 864 (1987) ("[t]he evidentiary requirements of due process are satisfied if there is 'some evidence' in the record to support a prison disciplinary decision revoking good time credits."); *In re Burton*, 80 Wn. App. 573, 910 P.2d ___, *review denied*, ___ Wn.2d ___ (1996). The some evidence standard does not apply to the *Wolff* requirement that prisoner's have the right to present witnesses.

Second, Balisok's argument about the some evidence standard cannot be correct because it would render *Wolff*'s due process requirements meaningless. *Wolff* requires that a prisoner (1) receive notice of the alleged violation; (2) have the opportunity to present witnesses and documentary evidence when not unduly hazardous to institutional safety and correctional goals, and (3) receive a written statement of evidence relied on and the reasons for the disciplinary action. *Wolff*, 418 U.S. at 563-66. According to Balisok, prison officials could violate all three of these due process requirements and a loss of good-time credits would always be sustained if there was some evidence of violations. It would be illogical if violations of *Wolff*'s due process requirements, which are specifically designed to prevent arbitrary deprivation of good-time credits, would never justify restoration of the good-time credits arbitrarily taken.

Balisok's § 1983 claim is barred by *Heck* because it necessarily implies the invalidity of his loss of good-time credits.

D. Dismissal of Balisok's § 1983 Claim is Consistent With *Wolff*.

We have set forth two independent bases why Balisok's § 1983 claim should be dismissed. Both are consistent with this Court's decision in *Wolff*, where a class action challenge to established prison disciplinary procedures was allowed to proceed.[12]

Balisok relies heavily on dicta in *Heck* where the Court suggested, without deciding, that the "passage [in *Wolff*] recognized a § 1983 claim for using the wrong procedures, not for reaching the wrong result." *Heck*, 114 S. Ct. at 2370; Res. Br. 14. However, *Heck* qualified this statement by observing that "the claim at issue in *Wolff* did *not* call into question the lawfulness of the Plaintiff's continuing confinement." *Heck*, 114 S. Ct. at 2370. As we have shown in this case, the serious procedural violations alleged by Balisok do call into question the lawfulness of his confinement.[13] *See supra*, p. 13-14.

We have also explained why *Wolff* is distinguishable as a class action challenge to established and undisputed

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[12]Balisok and the ACLU also argue that *Heck* has been uniformly and consistently applied to allow claims that seek only relief from procedures. Res. Br. 34-36, ACLU Br. 9-10. We established that this contention is not true in our petition and its reply. Pet. 12-21; Pet. Reply 1-6. Even authority cited by Balisok refutes this claim. Balisok cites *Dog Essence Saladin Amin v. Pruett*, ___ F. Supp. ___, 1996 WL 341522 (E.D. Va. June 12, 1996); Res. Br 35, n.22. In *Dog Essence* the district court applied *Heck* to dismiss a claim that a prison disciplinary proceeding violated due process. The court also noted that the circuits have failed to apply *Heck* uniformly.

[13]Moreover, if *Wolff* had resolved the question presented in this case, the Court would not have reserved it in footnote 2 of *Heck*, when it refused to address Heck's argument that he was only seeking damages for harm other than that stemming from his conviction.

state procedures. Pet. Br. 32-34. Unlike the broad-based challenge addressed in *Wolff*, Balisok's challenge is to alleged procedures of his own disciplinary proceeding.

Balisok argues that the existence of class certification is not relevant to the question of exhaustion because a court will apply the same test to decide whether the litigants will be entitled to prospective relief. Res. Br. 17 n. 11. Similarly, the ACLU argues that class certification is an irrelevant distinction because the number of prisoners in a case does not change the nature of the relief sought. ACLU Br. 24 n. 20.

Both Balisok and the ACLU miss the point of the class action distinction. Class certification is relevant because it does alter the nature of the claims that will be reviewed by the court. Through the process of class certification, a federal court can make a principled decision as to whether there may be a legitimate need for institution-wide relief from established state procedures. If there is, then the litigation will not merely involve the claims of individuals who have suffered a loss of liberty. The class will also include prisoners who have not yet lost good-time credits, are not attacking their duration of confinement, and whose claims are cognizable under § 1983.

Although some class members may have lost good-time credits, exhaustion is largely futile if identical claims are already being litigated on behalf of class members whose confinement is not called into question. In such a case, the court has the discretion to decide whether a class action is "superior to other available methods for the fair and efficient adjudication" of the procedural claims. Fed. R. Civ. P. 23(b)(3); *see Leonard v. Mississippi State Probation & Parole Bd.*, 509 F.2d 820, 823-24 (5th Cir.), *cert. denied*, 423 U.S. 998 (1975); *Project Release v. Prevost*, 463 F. Supp. 1033, 1039 (E.D.N.Y. 1978) (because habeas corpus was not available to those class members who may be confined in the future, suit under §

1983 was found proper); *Tucker v. Montgomery Bd. of Comm'rs*, 410 F. Supp. 494, 501 (M.D. Ala. 1976) ("Even if Tucker's suit is viewed as more in the nature of a habeas corpus claim, his status as class representative permits him to proceed under § 1983 on behalf of the class.").

II. CONCLUSION

For the foregoing reasons and those stated in the opening brief, the prison officials respectfully request that the decision of the United States Court of Appeals for the Ninth Circuit be reversed, and that Balisok be required to successfully exhaust his habeas corpus remedies before proceeding against state prison officials under § 1983.

RESPECTFULLY SUBMITTED

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